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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Under the Twenty-first Amendment grant to the states of virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system, does a state have the power to enact legislation prohibiting a licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner?

2. Is the California licensed liquor importer designation statute within the province of the Sherman Act?

LIST OF PARTIES

In addition to the parties listed in the caption, there were also two intervenors in the Court below: Bohemian Distributing Company, a California corporation, and Wine

and Spirits Wholesalers of California,
a California corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondents.

PETITION FOR A WRIT OF CERTIROARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

Petitioner, Baxter Rice, Director, Department of Alcoholic Beverage Control of the State of California, respectfully prays that a writ of certiorari issue to review

the judgment and opinion of the Court of Appeal, Third Appellate District, State of California, entered in the proceedings on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980.

OPINION BELOW

The opinion of the Court of Appeal, Third Appellate District, of the State of California in the case of Norman Williams Company, et al. v. Rice, 108 Cal.App.3d 348 (1980); ptn. for hrg. den. Sept. 24, 1980, is printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeal, Third Appellate District, of the State of California was entered in an original proceeding before that Court on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980. This

petition for certiorari is filed within ninety (90) days after the case became final in the courts of California. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XXI.

Section 2.

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Sherman Act, 15 U.S.C.

Section 1.

"Every contract, combination in the form of trust or otherwise, or

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . ."

California Liquor Importer Designation Statute.

Statutes of 1979, Chapter 280, Section 1.

"Business and Professions Code Section 23672.

"A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such dis-

tilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

STATEMENT OF THE CASE

The federal questions sought to be reviewed in this case were raised initially in the California Court of Appeal, Third Appellate District, which, in this case, was a Court of first instance. Reference is made to the Petition for Writ of Mandate at pages 12 and 13; to the Points and Authorities in Support Thereof at pages 12 and 13; and to the Amended Petition for Writ of Mandate at pages 4, 12 and 13. Copies of these pages are annexed in the Appendix. The issues were discussed ex-

tensively by the parties in over hundreds of pages in subsequent Points and Authorities and in oral argument.

The Court of Appeal only passed on federal issues and its entire Opinion, commencing at page 6 as cited in the Appendix, concerns the Court's resolution of those federal issues.

In 1973, the California Legislature enacted Business and Professions Code section 23672 which prohibited a state licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he was designated as an authorized importer by a licensee who filed the minimum retail price schedule for that brand in accordance with the existing state fair trade liquor statutes.[1/]

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1. Stats. 1973, ch. 707, p. 1283, § 1:

"23672. A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated

That latter licensee was necessarily the brand owner, or the brand owner's California agent.

This statute was strictly enforced by the California Department of Alcoholic Beverage Control until 1978, when the California Supreme Court ruled that the State distilled spirits fair trade statute was in violation of the Sherman Act.[2/] At that time, because minimum retail price schedules were no longer permitted, the Department took the position that, as there was no longer any licensee available who could file a minimum retail price

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as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

2. Rice v. Alcoholic Beverage Appeals Board, 21 Cal.3d 431 (1978).

schedule, it would no longer enforce the statute.

Among the respondents are licensed importers and wholesalers of distilled spirits as well as licensed retailers of distilled spirits. The importer respondents, no longer being under enforceable statutory restraint, secured sources of supply of national brand distilled spirits in Oklahoma and imported them into California.

This was permissible under Oklahoma law which provided that a distiller choosing to sell distilled spirits in that state must sell to all licensed Oklahoma wholesalers and may not discriminate either as to price or as to quantity.[3/]

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3. Okla. Stats. 1961, Vol. 12, tit. 37, § 501 et seq.

The distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate which the seller sells in any other state.[4/] The licensed wholesalers may sell to any licensed retailer or wholesaler within Oklahoma, and may sell distilled spirits out of Oklahoma to "qualified persons."[5/]

In 1979, the California Legislature, purposely seeking to correct this new method of importation growing sporelike on the surface of the existing three-tiered statutory structure of the state's liquor distribution system, amended the importer designation statute to read:

"§ 23672. A licensed importer

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4. Id. § 536.1, subd. (a).
5. Id. § 521, subd. (e).

shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of a licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." 6/

The purpose of this amendment was to put the law back to where it was before the State Supreme Court declared the retail price maintenance law invalid; i.e., the brand owner or his authorized agent

6. Stats. of 1979, ch. 280, § 1. Only the first sentence was amended. The second sentence remained unchanged.

was the only person who could file the minimum retail price schedule and hence designate the importer under the old law; the brand owner or his authorized agent is the only person who can designate the importer under the new law.

Respondents successfully brought an original proceeding in the California Court of Appeal, Third Appellate District, for a writ of mandate permanently ordering the instant petitioner, Director of the California Department of Alcoholic Beverage Control,"to refrain from enforcing that portion of Business and Professions Code section 23672 which provides:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorizied importer of such brand by the brand

owner or his authorized agent." (Norman Williams Company, et al. v. Rice, 108 Cal.App.3d 348, 353 (1980); ptn. for hrg. den. by Calif. Supreme Court.)

The decision of the Court of Appeal was based entirely on federal grounds:

"We find that the substantial federal policies of the Sherman Act are violated by the liquor designation statute and, in light of clear alternatives to that statute, the state interests sought to be achieved are not sufficient to outweigh those policies. We conclude that Business and Professions Code section 23672, as amended by Assembly Bill Number 499 (Stats. 1979, ch. 280, § 1) is invalid to the extent it authorizes private action in restraint of trade." (Norman Williams, supra, at p. 362.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN CALIFORNIA LIQUOR DEALERS v. MIDCAL ALUMINUM, 455 U.S. 79 (1980) WITH REGARD TO THE TWENTY-FIRST AMENDMENT GRANT TO THE STATES OF VIRTUALLY COMPLETE CONTROL OVER IMPORTATION OF LIQUOR AND STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM

In California Liquor Dealers v. Midcal Aluminum, 455 U.S.97 (1980), this Court emphasized that there was much more to the Twenty-first Amendment than whether a state could merely determine whether or not to permit importation of alcoholic beverages within its borders. Tracing the history of the states' powers under the Twenty-first Amendment, this Court said:

"In determining state powers

under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. State Board v. Young's Market Co., 299 U.S. 59, 63-64 (1936). [Fn. omitted.] In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. Ziffrin Inc. v. Reeves, 308 U.S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority."

"It then pointed out that ". . .

early decisions . . . recognized that each State holds great powers over the importation of liquor from other jurisdictions"; that, "(s)ubsequent decisions have given 'wide latitude' to state liquor regulation . . . but they have also stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment"; that it was more difficult to define ". . . the extent to which Congress can regulate liquor under its interstate commerce power"; that the Twenty-first Amendment and the Commerce Clause ". . .each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case"; that "(t)his pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for

anticompetitive conduct not mandated by a State." (Midcal, supra, at pp. 106-109.)

The Court continued:

"These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" (Midcal, supra, at p.110.)

The preceding paragraph was highlighted when, in a post-opinion letter to Mr. Justice Powell, counsel for Midcal unsuccessfully urged that the Court delete or amend the language so no inference could be taken which would indicate that the states had such broad powers under the Twenty-first Amendment unless the state itself excluisvely operated the liquor business within its boundaries.

Further emphasis was given to the Midcal recognition of the Twenty-first Amendment's grant of practically plenary power to the states over whether to permit importation and sale of liquor and how to structure the liquor distribution system by this Court's recent dismissal of the appeal in Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen, October Term, 1980, No. 80-189, for want of a substantial federal question. The issues framed by the

parties were essentially the same ones that are present in the instant case. The dismissal in that case would appear to be a strong indication that this Court intended to solidify the basic premise of its Midcal holding with respect to the extent of power the Constitution grants to the states under the Twenty-first Amendment. (See discussion in Stern & Gressman, Supreme Court Practice, Fifth Edition, pages 323 et seq., and cases cited therein.)

In the instant case, the California Court of Appeal arbitrarily brushed aside the Midcal declaration regarding the Twenty-first Amendment grant "to the states of virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." With no analysis whatever, the Court concluded that it

simply was inapplicable, saying:

> "California has determined to permit the importation of liquor into the state by private parties and has established a distribution system of which the petitioners are a licensed part. In division 9 of the Business and Professions Code the state has provided detailed requirements for those who desire to engage in the distribution of alcoholic beverages and the petitioners have complied with those requirements and obtained state approval to participate in the distribution of liquor. The designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of

the channels of distribution. The designation statute, like the price maintenance laws, is precisely the type of regulation which must be reconciled with the federal interests in interstate commerce." (Norman Williams Co. v. Rice, supra, at p. 359.)

The conclusion of the Court of Appeal was erroneous.

A. Statutory Control Over Liquor Importers Is Directly Within The Twenty-first Amendment Grant Of The Power Of The States

The Court of Appeal completely ignored this Court's Midcal express citation to Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939), for the proposition that the Twenty-first Amendment grant to the States giving them control over the transportation or importation of liquor into their territories, ". . . logically entails

considerable regulatory power not strictly limited to importing and transporting alcohol." (Midcal, supra, at 107.)

It also ignored the lessons of earlier cases such as State Board v. Young's Market Co., 299 U.S. 59 (1936), which related to the requirement of a license fee for interstate alcohol beverage imports; Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938), which concerned restrictions on the type of liquor permitted to be imported from sister states; and Finch & Co. v. McKittrick, 305 U.S. 395 (1939) and Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 91; where, despite the Commerce Clause, the State authority was upheld because of the special powers granted to the States by the "importation or transportation" language of the Twenty-first Amendment.

The California statute under attack is a pure expression of the regulatory

power given by that Amendment. It seems clearly to go to the issue of "whether to permit importation." Under the statute, importation is only permitted if two factors coincide: (1) a licensed importer, and (2) a designation by a brand owner of that importer as one who has the brand owner's authorization to bring that particular brand of distilled spirits into the State. It is only from among the pool of those licensed importers who already have been investigated and qualified by the State that the choice may be made.

B. The Structure Of The Liquor Distribution System Is Directly Within The Twenty-First Amendment Grant Of Power To The States

The Court of Appeal totally ignored the constitutional grant of power to the States through the Twenty-first Amendment to structure the liquor distribution system.

Like many states, the California alcoholic beverage distribution system is based on a three-tiered structure: (1) distiller to (2) importer wholesaler to (3) retailer. (See Harris v. Alcoholic Bev. etc. Appeals Bd, 61 Cal.2d 305, 309 (1964); California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd., 5 Cal.3d 402, 407-408 (1971). Respondent importers operate outside this three-tiered system. They place orders with an Oklahoma broker or order taker who buys from the distiller and sells to the ordering importer. A fourth tier is thus now in existence outside the statutory scheme: (1) distiller to (2) broker to (3) importer wholesaler to (4) retailer.

The Court of Appeal recognized this intrusion on the structure of the liquor distribution system and the existence of a fourth tier, but attempted to bypass the legislative function entirely, by strangely concluding that the policy behind the three-tiered structure would be strengthened if this new fourth tier which the Legislature specifically attempted to prevent were permitted to operate. In a footnote, that Court said:

> "3/ The designation statute is actually directly contrary to the public policy behind the three-tier distribution system. The three-tier system was established to maintain the independence of the various levels of the liquor industry and to prevent the integration of manufacturing, wholesale and retail

functions. [Citing Harris v. Alcoholic Bev. etc. Appeals Bd., supra.] The designation statute reimposes the dependency of wholesalers upon brand owners which the three-tiered system was designed to prevent." (Norman Williams, supra, at p. 360.)

Assuming, arguendo, that the statute might be somehow contrary to the policy behind the three-tier structure issue, a conclusion to which we have strong exception, particularly since the Legislature enacted this new statute and must know its own policy, the question is not whether it might or might not effect the legislative policy, but rather does it require judicial alteration of the three-tier system. The Legislature

is the only proper group with the power to make that determination. If the legislative policy behind the three-tier system seems to a court to be jeopardized, the Legislature is the only body authorized to make the change to a four-tier system, not the Court.

Unquestionably here, there is a vital question as to whether a state Legislature has the constitutionally granted power under the Twenty-first Amendment to determine whether its liquor distribution system should be three-tiered or otherwise.

Permitting a local state court to substitute its judgment as to the details of the structure of the liquor distribution system on the theory that it has such power through interpretation of the Sherman Act, solely a federal ground, is

to deny the Midcal confirmation of constitutional grant to the State Legislature to formulate any liquor distribution system whatsoever. To hold otherwise would mean that if a local court found any restraint of trade resuling from any liquor statute, it could strike it down regardless of what legislative policy may have been present at its enactment. The enormity of the situation which would result is easily envisioned when it is realized that practically every liquor statute has some restraint of trade feature connected to it; i.e., prohibition of free goods, special rebates, free displays, inventory shelving, etc.

II. THE ERRONEOUS INTERPRETATION OF THE TWENTY-FIRST AMENDMENT, WITH RESPECT TO IMPORTATION OF LIQUOR, BY THE CALIFORNIA COURT OF APPEAL COULD HAVE A DIRECT DELETERIOUS EFFECT ON THE LAWS OF ALMOST ONE-THIRD OF THE OTHER STATES

There are a number of states which have enacted liquor control statutes that have the same, or a similar effect on importation of liquors as the California statute under consideration.[7/] Collectively, they are

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7. The statutes or regulations of fifteen such states and the District of Columbia, as set out in the Appendix to the Memorandum of Points and Authorities in Opposition to Petition for Writ filed by intervenor Wine & Spirits wholesalers of California in the Court of Appeal are: Ariz. Rev. Stat. Ann. § 4-243.01, Ark. Stat. Ann. § 48-305; Colo. Rev. Stat. § 12-47-128(2)(c) & (3); Conn. Gen. Stat. Ann. § 30-63 (West); D.C. Regs. A.B.C. Bd., tit. 3, ch. I, part 4, § 4.11; Fla. Stat. Ann. §§ 564.045, 565.095 (West); Ill. Ann. Stat. ch. 43, § 126 (Smith-Hurd); La. Rev. Stat. Ann. § 26-370B (West); Md. Regs. Comp. Treas., tit. 03, subtitl. 02, ch. 01, § 03.02.12; Mo. Ann. Stat. § 311.275 (Vernon); Neb. Rev. Stat.

commonly referred to as "primary source laws," i.e., they force wholesalers to purchase only from primary sources (distillers), and thus perpetuate the three-tier system of distribution referred to in section I,B, herein:

Typical examples are:

Arizona:

Ariz. Rev. Stat. Ann. § 4-243.01 provides in part:

"A. It is unlawful:

"1. For any supplier to solicit, accept or fill any order for any spirituous liquor from any wholesaler in this state unless the supplier is the primary source of supply for the brand of spirituous liquor sold or sought to be sold.

§ 53-130; N.J. Adm. Code § 13:2-36.4; N. Dak. Reg. St. Treas., §§ 84-02-01-04 R.I. Gen. Laws § 3-6-16; Tex. A.B.C. Code Ann. § 37.10 (Vernon); Wis. Stat. Ann. § 176.17(7) (West).

"2. For any wholesaler or any other licensee in this state to order, purchase or receive any spirituous liquor from any supplier unless the supplier is the primary source of supply for the brand ordered, purchased or received.

* * *

"E. For the purposes of this section:

"1. 'Primary source of supply' means the distiller, producer, owner of the commodity at the time it becomes a marketable product, bottler or exclusive agent of any such distributor or owner. In the case of imported products, the primary source of supply means either the foreign producer, owner, bottler or agent or the prime importer

from, or the exclusive agent in, the United States of the foreign distiller, producer, bottler or owner."

District of Columbia:

The regulations of the Alcoholic Beverage Control Board, tit. 3, ch. I, part 4, Section 4.11 provides:

"It shall be unlawful for any wholesaler to purchase any distilled spirits or wines for resale unless said alcoholic beverages are purchased from the primary American source of supply for the brand of distilled spirits or wines sought to be sold nor [sic] to sell any distilled spirits or wines to licensees within the District of Columbia if said alcoholic

beverages have not been purchased by said wholesaler from the primary American source of supply."

Regulation No. 73-21 further provides that:

"The term 'primary American source of supply' shall mean the owner of the aforesaid distilled spirits or wine at the time said beverages first become marketable products in the United States."

Significantly, these statutes and regulations require the wholesaler-importer to purchase only directly from the manufacturer-distiller. Axiomatic to three-tier system is the necessary designation of the wholesaler-importer by the manufacturer-distiller, a practice common to all industrial distribution, including the liquor trade.

The California statute, while worded

the other way, has the same effect. It prevents a licensed importer from importing liquor unless he is designated as an authorized wholesaler-importer by a manufacturer-distiller.

Interestingly, the California Court of Appeal actually interpreted the statute as if it read the way the other state statutes and regulation cited read:

> "The designation statute gives brand owners the unfettered power to restrain competition, not by relying upon any artifice such as tying arrangements or group boycotts, but by merely deciding who may and who may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed

California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine.

"It is suggested in opposition to the petition that brand owners have the inherent power to designate importers to whom they will sell and that the designation statute merely recognizes this power. We emphatically reject this construction of the statute. The statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturer to forbid others to sell to a disfavored importer. We are not concerned with any contractural channel of distribution

a brand owner might create or use; we are concerned with the state-provided authority to prevent trade among others. . . . " (Norman Williams, supra, at pp. 356-357.)

In Ziffrin v. Reeves, supra, 308 U.S. 132 (1939), this Court upheld a Kentucky statute which permitted manufacture of liquor only if it were to be sold to an indicated class of customers and transported in definitely specified ways. The Court found these conditions reasonable and "clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils and secure payment of revenue." (Ziffrin, supra, at p. 139). Of particular interest is the Court's comment:

"In effect we are asked by injunction to allow a distiller

to do what the statute prohibits--deliver to an unauthorized carrier. Also to enable a carrier to do what it is prohibited from doing - receive and transport within the State." (Ziffrin, supra, at 139.)

If we substitute the words "undesignated importer" for "carrier," the same lanugage could be used to show how wrong the Court of Appeal is in the instant case.

The Norman Williams' discussion cited above applies equally as well to California as to all those other states having similar primary source legislation. If this incorrect decisoin is allowed to stand, it will lead to direct attack on the laws and regualtions of each of those states.

III. THE ERRONEOUS INTERPRETATION OF THE TWENTY-FIRST AMENDMENT WITH RESPECT TO STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM DIRECTLY EXPOSES EVERY STATE'S WHOLESALE LIQUOR LICENSE REGULATIONS TO ATTACK

One of the Court of Appeal's basic underlying premises is, apparently, that if any court believes a state-engendered statutory liquor distribution structure violates the Sherman Act, the Court has the duty to alter that legislatively determined structure if necessary; here, the Court does so by striking the statute, even though doing so creates a four-tier instead of a three-tier liquor distribution system in the state.

The Court of Appeal thus totally ignores the Twenty-first Amendment grant to the states of practically plenary power over the structure of liquor distribution system. It attempts to justify its position by reference to an interference

with interstate commerce" argument; however, it fails to realize that the Twenty-first Amendment prevails over the Commerce Clause where importation or the distribution system is involved. (Midcal, supra, at p. 110.)

We are not dealing here with a price statute which has been held to be an "other" regulation outside the structure of the liquor distribution system.(Midcal, supra, at p. 110.) Here, we are right in the middle of such a structure, i.e., can the state perpetuate a three-tier system of distribution if doing so might have some restraint on interstate commerce wich the creation of a fourth tier will alleviate?

It is submitted that once we find outselves truly in a "structure" context, as in the instant case, we then logically are forced to conclude that the Twenty-

first Amendment takes precedence over the Commerce Clause in this instance. This is so because our case falls within the structure grant of State powers under the Twenty-first Amendment.

Additionally, in order to develop a harmonious relationship between these two sections of the Constitution, we readily may do so if we consider the Twenty-first Amendment grant as a specific power directed at the structure of the liquor distribution system, and the Commerce Clause as a more general restriction on the power of the States to govern the liquor traffic within their borders in those other instances where it may be applicable.

The Court of Appeal reached an incorrect conclusion because it failed to realize that its creation of a legal fourth

tier of operation was a restructuring of the State's liquor distribution system, a matter solely within the constitutional grant to the Legislature.

If this decision stands, the entire liquor distribution structure developed by each state legislature will be directly exposed to attack in the courts and subject to alteration as judges may see fit.

IV. THE ERRONEOUS COURT OF APPEAL DECISION SOLELY ON FEDERAL GROUNDS, CLOUDS EXISTING ANTI-TRUST LAW BY CREATING A NEW PER SE ILLEGALITY CATEGORY WHICH SHOULD BE CAREFULLY EXAMINED BY THIS COURT

The Court of Appeal opinion is incorrectly based on the applicability of the Sherman Act over the Twenty-first Amendment. If this approach is taken, the Court of Appeal is still in error and certiorari should be granted to overturn its ruling.

In the instant opinion, the Court of Appeal listed a number of the "per se illegalities" among Sherman Act anti-trust law considerations established by the United States Supreme Court, i.e., "certain practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable." The list included tying arrangements, agreements among competitors to divide markets or allocate customers, group boycotts, agreements to limit production, and price fixing. (Norman Williams Co. v. Rice, supra, pp. 355-356.)

The Court of Appeal then conceded that the instant case was not one of the recognized per se categories, but nevertheless treated it as a per se case:

"Petitioners attempt to analo-

gize Business and Professions Code section 23672 to certain per se violations of the Sherman Act in order to demonstrate its invalidity. The opposition to the petition argue that the statute does not clearly come within a declared per se violation and must be upheld in this proceeding. It is difficult to analyze the designation statute in terms of common violations of the Sherman Act because of the unique nature of the statute. The designation statute gives brand owners the unfettered power to restrain competition, not by relying upon any artifice such as tying arrangements or group boycotts, but by merely deciding who may and who may not compete. In effect, that statute

gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine: (Norman Williams, supra, p. 356.)

"The section does not merely authorize a private party to engage in practices which may restrain interstate trade; rather, it gives private parties the unfettered power to forbid interstate trade between other private parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act. We conclude that Business and Professions

Code section 23672 is invalid unless the state action exemption to the Sherman Act or the Twenty-first Amendment to the United States Constitution authorizes such a delegation of authority." (Norman Williams, supra, p. 358.)

But, regardless of how clear the Court of Appeal may be able to visualize the power to restrain interstate trade because of the instant statute, it may not properly reach the conclusion that the case should be treated as if it were a per se case.

Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (1977) is almost directly in point. There, Coors' attempt to prevent a retailer from selling beer to a wholesaler in another state was

held not be be a per se violation of the Sherman Act:

> "A & S contends that the trial court erred in failing to instruct the jury that Coor's efforts at firm and resolute enforcement of territorial restrictions on the resale of its products constituted a per se violation of Section 1 of the Sherman Act.
>
> ". . . The Supreme Court decision in Continental T.V., Inc. v. GTE Sylvania Incorporated, supra, disposes of this issue adversely to A & S." (Coors, supra, at p. 812.)

It is thus clear that there is no per se violation because of the instant statute. That being the case, the only way the Court of Appeal could ever possibly reach a conclusion of violation of the Sherman Act on the theory that the

statute unreasonably restrained trade would be by analogy to the so-called "rule of reason" test, assuming it is even applicable here.

Parenthetically, we are unaware of any case where the rule of reason has been applied to invalidate a statute. In the customary situation, the test is applied to the conduct of parties, not enactments of legislative bodies.

Under the rule of reason test,

> ". . . the court must originally consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason

for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts . . . . " (Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).)

The "rule of reason" was discussed recently in Continental TV, Inc. v. GTE Sylvania, Inc. (Sylvania), 433 U.S. 36 (1977). In that case, the Court reconsidered and overruled United States v. Arnold Schwinn & Co. (Schwinn), 388 U.S. 365 (1967)

In Schwinn, it had held a per se violation of the Sherman Act occurred when there existed a manufacturer-imposed limitation on customers to whom a distributor could sell after title to the goods was acquired by the distributor.

In Sylvania, the Court held that

there was no per se violation of the Sherman Act where Sylvania had included in its retailer franchise agreements a prohibition against the sale of its branded products except from specific locations.

None of the considerations required by the rule of reason test was investigated by the Court of Appeal in the instant case. It merely followed the pattern and structure of the Midcal decision, i.e., determination of per se violation; determination that it was not exempt as state action under the doctrine of Parker v. Brown, 317 U.S. 341 (1943); determination that it was not immune under the Twenty-first Amendment. That was essentially the extent of the Court of Appeal analysis.

The failure of the Court of Appeal

to apply the analogy of the rule of reason test assuming, arguendo, that the test is even applicable, caused it to reach its erroneous conclusion as to invalidity of the statute under the Sherman Act.

Unless the instant case is reversed, a new principle will quickly creep into the body of antitrust law, i.e., if something is not a per se situation, but may be like it in some respects, it should be treated as if it were a per se case, with no further analysis, and the rule of reason approach should be totally disregarded.

COMCLUSION

This Court will recall that when California Retail Liquor Dealers Association v. Midcal, supra, was before it earlier this year, the California Department of Alcoholic Beverage Control declined

to join in the Petition for Certiorari. (Note Midcal, supra, footnote 12, p. 111.)

In the instant case, however, the Director, again a respondent below, and now the petitioner in this Petition for Certiorari, is strongly urging that the Court of Appeal in Norman Williams has totally misinterpreted the import of this Court's opinion in the Midcal case. Here, there are valid State interests that can be pointed to which directly concern the importation of liquor and the structure of the liquor distribution system.

Midcal draws a line below which the State cannot go, i.e., it cannot enact a liquor statute which delegates to private persons the totally unsupervised power to fix prices. That is obviously one of those ". . . other liquor regulations. . . subject to the federal commerce power in

appropriate situations. . . . " (Midcal, supra, at p. 110.)

On the other side of the line, however, is the Twenty-first Amendment grant to the states of ". . . virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (Midcal, supra, at p. 110.)

Petitioner urges that the California statute, which prohibits a licensed liquor importer from purchasing or accepting delivery of any brand unless he is designated as an authorized importer of the brand by the brand owner, is totally within both the constitutionally granted power to determine whether to permit importation and within the power to determine how the liquor distribution system should be structured.

The statute under consideration is within the explicit grant of authority given to the States by the Twenty-first Amendment.

The statute sets up three tiers of distribution in the California liquor industry, i.e., manufacturer-distiller to importer-wholesaler, to retailer. The Court of Appeal decision under attack recognizes this three-tier structure common to the California liquor industry for many years, but amazingly concludes that even though the statute preserves the three-tier structure, it somehow has the effect of destroying the legislative policy behind the three-tier system. The Court of Appeal concludes that by striking down the statute and letting a legislatively anticipated illegal fourth tier operate (distiller to Oklahoma broker, to

importer-wholesaler, to retailer), it will perpetuate the legislative policy behind the three-tier structure.

The Court of Appeal erred because it placed the importer designation statute in the same vein as the retail price maintenance statute found invalid in Midcal. Admitting that no per se violation of the Sherman Act existed, it nevertheless decided that the importer designation should be treated as if it were a per se case. With no analysis analogous to that used in rule of reason cases, it found the importer designation statute invalid.

Significantly, some 15 states and the District of Columbia have statutes or regulations which have the same or a similar effect as the California statute under consideration, i.e., the importer-wholesaler is required to purchase from

the primary source, the distiller.

Unless certiorari is granted, the liquor laws of each of those other States will be in gross jeopardy and subject to immediate attack in the courts of those several States.

Additionally, because of the newly created per se violation of the Sherman Act, unless this decision is corrected, the entire field of federal antitrust law will be left muddied and confused.

For the foregoing reasons, this Court should issue its Writ of Certiorari to the California Court of Appeal, Third Appellate District, to review the judgment

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in the case of Norman Williams Co., et al., v. Rice, No. 3 Civ. 19089, decision filed July 17, 1980, and reported at 108 Cal.App. 3d 348 (1980).

Respectfully submitted,

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